A

DATUK YONG TECK LEE & ANOR

v.

DATUK HARRIS MOHD SALLEH

B

COURT OF APPEAL, PUTRAJAYA
LINTON ALBERT JCA
ANANTHAM KASINATHER JCA
ZAKARIA SAM JCA
C [CIVIL APPEAL NO: S-02-691-03-2012]
3 APRIL 2014

TORT: *Defamation - Libel - Defence - Qualified privilege - Newspaper article - Statements calling for fresh inquiry on cause of aircraft crash -*
D *Whether real contribution to public interest element in article - Whether statements issued on privileged occasion - Whether statements resulted from revelation of new evidence - Whether truth of revelation must be verified - Whether inclusion of defamatory statement justifiable in light of revelation*

E

On 6 June 1976 a Nomad aircraft crashed on its way to Kota Kinabalu, killing a substantial number of the cabinet members of the then ruling party of the State Government of Sabah, including the then Chief Minister of the State, Tun Fuad Stephens. The
F respondent was about the only senior member of the State Cabinet to be not on the flight and assumed the role of Chief Minister following the crash. There was an air of unease concerning the crash following rumours concerning role played by the respondent in disembarkation of three passengers who were in
G the original passenger list just before the aircraft departed, one of whom was the then Finance Minister of Malaysia, Tengku Razaleigh. The Federal Government and the State Government of Sabah conducted investigations on the cause of the crash, but, it was never made public. However, books bearing titles 'Harris
H Salleh of Sabah' and 'The Sabahan - The Life and Death of Tun Fuad Stephen' speculated the causes of the crash. By the year 2010, when the speculation over the causes of the crash was on the wane, it was reignited by the speech of Tengku Razaleigh at a forum in Sabah, revealing for the first time in public, that he was
I already seated and strapped to his seat in the aircraft when the respondent came on board and invited him to leave the aircraft and board another aircraft to visit the respondent's cattle farm.

The appellant, though not present at the forum, verified the fact of the revelation and subsequently issued a statement, essentially calling for a reinvestigation of the crash in the light of the new information. The respondent issued a statement disputing Tengku Razaleigh's version of events resulting in the issuance of a second statement by the appellant, setting out the reasons behind his call for the reinvestigation of the crash. The respondent therefore, commenced a legal proceeding against the appellant for libel. The trial judge ruled in favour of the respondent and the appellant was ordered to pay the sum of RM1 million in damages. Hence, the appeal by the appellant.

Held (allowing appeal; setting aside orders of High Court)
Per Anantham Kasinather JCA delivering the judgment of the court:

(1) Although the trial judge was correct in ruling that the statements were defamatory and that the defence of justification did not avail the appellant, the defence of qualified privilege was not properly considered and the law on the subject was not properly applied to the facts of the case. The appellant's statements were issued on a privileged occasion since the respondent had a duty or, at the least, an interest as a politician and the leader of a political party, to communicate to the public at large, through his first and second statements, the contents of Tengku Razaleigh's revelations and to call for the fresh inquiry into the cause of the crash. (para 13)

(2) The finding by the trial judge that the appellant's failure to verify the truth of the revelations with Tengku Razaleigh directly as affording evidence of malice, did not represent the law. The fact that the statement 'is in fact untrue and defamatory' did not preclude the defence from availing the appellant. Hence, the trial judge fell into serious error in dissecting the speech of Tengku Razaleigh to ascertain the truth of the contents of the same before concluding that, to the extent the appellant had not verified the truth of the contents of Tengku Razaleigh's speech, 'he is therefore to be treated as if he knew the revelation to be false'. (para 16)

(3) The defence of qualified privilege requires a factual basis. However, the factual basis on the facts of this case was not whether the revelations of Tengku Razaleigh were true but whether it was true that he made the revelations. There was

ample evidence of this fact as there was the unchallenged evidence of the appellant that he verified, whether Tengku Razaleigh made the revelations, with several persons who were present at the forum. There was also the evidence of DW4 of his attendance at the forum and of Tengku Razaleigh's revelations during the course of this speech at the forum which was acknowledged by the trial judge to be true. (para 17)

(4) The law requires the judge to consider the appellant's two statements as a whole and if the article as a whole is justifiable, then, the defence of qualified privilege avails the appellant even if the article is defamatory and some facts untrue. In other words, even if the appellant's call for the reopening of the investigations was defamatory, and this call did not form part of Tengku Razaleigh's revelations, to rule against the appellant on the ingredient of malice, the trial judge ought to have considered the two statements as a whole to determine 'whether the inclusion of the defamatory statement was justifiable' in the light of Tengku Razaleigh revelations, the making of which was true. (paras 18 & 19)

(5) The appellant's call for the re-opening of the investigations made 'a real contribution to the public interest element in the article'. It did not run foul of any of the three tests propounded in *Reynolds v. Times Newspaper Ltd* because: (i) the earlier investigations did not result in the publication of a report as regards the causes for the crash; (ii) the versions in the two books vary from Tengku Razaleigh's revelations and there was no evidence that Tengku Razaleigh was the source for versions of the crash contained in the two books. His revelations clearly amounted to new information which warranted a fresh look at the crash, justifying the appellant's call for fresh investigations to clear all doubts for the cause of the crash; and (iii) the tone of the article could not be said to be provocative since the appellant merely called for a re-opening of the investigations and acknowledged the fact that the fresh investigation based on Tengku Razaleigh's revelations may result in nothing at all. The fact of the matter was the appellant's call for the re-opening of the investigations ties in with Tengku Razaleigh's revelations and the inconclusive nature of the earlier investigations. (paras 21 & 22)

(6) The award of RM1 million by way of damages was excessive on the particular facts of the case. The trial judge was influenced by his earlier ruling that the appellant had failed to verify the truth of Tengku Razaleigh's revelations when there was no such burden since the defence relied upon was qualified privilege/fair comment and not justification. (para 24)

Bahasa Malaysia *Translation Of Headnotes*

Pada 6 Jun 1976 sebuah pesawat Nomad terhempas dalam perjalanannya ke Kota Kinabalu, membunuh sejumlah besar ahli-ahli Kabinet parti pemerintah Kerajaan Negeri Sabah pada ketika itu, termasuk Ketua Menteri negeri itu, Tun Fuad Stephens. Responden adalah satu-satunya ahli kanan Kabinet Negeri yang tidak termasuk dalam penerbangan tersebut dan menjawat jawatan Ketua Menteri berikutan nahas tersebut. Wujud keadaan yang tidak menyenangkan berkaitan dengan nahas tersebut berikutan khabar angin mengenai peranan yang dimainkan oleh responden dalam penurunan tiga penumpang yang termasuk dalam senarai asal penumpang sejurus sebelum pesawat tersebut berlepas, salah seorang daripadanya adalah Menteri Kewangan Malaysia pada ketika itu, Tengku Razaleigh. Kerajaan Persekutuan dan Kerajaan Negeri Sabah menjalankan siasatan terhadap sebab kemalangan tersebut, tetapi, ia tidak pernah diumumkan. Walau bagaimanapun, buku-buku yang bertajuk 'Harris Salleh of Sabah' dan 'The Sabahan - The Life and Death of Tun Fuad Stephen' membuat spekulasi mengenai sebab nahas tersebut. Pada tahun 2010, apabila spekulasi berkaitan dengan sebab nahas tersebut semakin berkurangan, ia dihidupkan semula melalui ucapan Tengku Razaleigh di suatu forum di Sabah, mendedahkan buat pertama kalinya di khalayak umum, bahawa dia telahpun duduk dan memakai tali pinggang keselamatan dalam pesawat tersebut apabila responden datang dan menjemputnya meninggalkan pesawat tersebut dan menaiki pesawat lain untuk melawat ladang penternakan lembu responden. Perayu, walaupun tidak hadir dalam forum tersebut, mengesahkan fakta mengenai pendedahan tersebut, dan kemudian mengeluarkan kenyataan, yang pada asasnya memanggil penyiasatan semula nahas tersebut berdasarkan maklumat terbaru. Responden mengeluarkan kenyataan menafikan versi kejadian oleh Tengku Razaleigh yang mengakibatkan pengeluaran kenyataan kedua oleh perayu, menyenaraikan sebab-sebab mengapa dia memanggil penyiasatan semula nahas tersebut.

A Responden oleh itu, memulakan prosiding undang-undang terhadap perayu bagi libel. Hakim bicara memutuskan memihak kepada responden dan perayu diperintahkan membayar sejumlah RM1 juta sebagai ganti rugi. Dengan itu, rayuan oleh perayu.

B **Diputuskan (membenarkan rayuan; mengenepikan perintah Mahkamah Tinggi)**
Oleh Anantham Kasinather HMR menyampaikan penghakiman mahkamah:

C **(1)** Walaupun hakim bicara betul dalam memutuskan bahawa kenyataan-kenyataan tersebut adalah memfitnah dan bahawa pembelaan justifikasi tidak boleh digunakan kepada perayu, pembelaan perlindungan bersyarat tidak dipertimbangkan dengan sewajarnya dan undang-undang mengenai perkara tersebut tidak diaplikasikan dengan sewajarnya kepada fakta D kes. Kenyataan-kenyataan perayu dikeluarkan dalam keadaan istimewa kerana responden mempunyai kewajipan atau, sekurang-kurangnya, kepentingan sebagai ahli politik dan pemimpin parti politik, untuk menyampaikan kepada masyarakat umum, melalui kenyataan pertama dan keduanya, kandungan E pendedahan Tengku Razaleigh dan untuk memanggil siasatan semula mengenai sebab nahas tersebut.

(2) Dapatan oleh hakim bicara bahawa kegagalan perayu membuat pengesahan mengenai kebenaran pendedahan tersebut dengan F Tengku Razaleigh secara langsung menunjukkan keterangan niat jahat, tidak menggambarkan undang-undang. Fakta bahawa kenyataan tersebut 'adalah sebenarnya tidak benar dan memfitnah' tidak menghalang pembelaan tersebut memihak kepada perayu. Dengan itu, hakim bicara terkhilaf secara serius G dalam menganalisa ucapan Tengku Razaleigh untuk menentukan kebenaran kandungannya sebelum memutuskan bahawa, setakat yang perayu tidak mengesahkan kebenaran kandungan ucapan Tengku Razaleigh, 'dia dengan itu dianggap sebagai mengetahui pendedahan tersebut tidak benar'.

H **(3)** Pembelaan perlindungan bersyarat memerlukan asas fakta. Walau bagaimanapun, asas fakta dalam fakta kes ini bukan sama ada pendedahan Tengku Razaleigh adalah benar, sebaliknya sama ada benar bahawa beliau membuat I pendedahan tersebut. Terdapat banyak keterangan bagi fakta ini kerana wujud keterangan oleh perayu yang tidak dicabar bahawa dia telah mengesahkan, sama ada Tengku Razaleigh

telah membuat pendedahan tersebut, dengan beberapa orang yang hadir dalam forum tersebut. Juga terdapat keterangan DW4 mengenai kehadirannya di forum tersebut dan tentang pendedahan Tengku Razaleigh semasa ucapannya dalam forum tersebut yang diakui oleh hakim bicara sebagai benar.

(4) Undang-undang memerlukan hakim untuk mempertimbangkan kedua-dua kenyataan perayu secara keseluruhan dan jika artikel tersebut secara keseluruhannya adalah berjustifikasi, maka, pembelaan perlindungan bersyarat memihak kepada perayu walaupun artikel tersebut adalah memfitnah dan beberapa faktanya tidak benar. Dalam perkataan lain, walaupun permintaan perayu untuk membuka semula penyiasatan adalah memfitnah, dan ini tidak membentuk sebahagian daripada pendedahan oleh Tengku Razaleigh, untuk membuat keputusan menentang perayu atas elemen niat jahat, hakim bicara sepatutnya mempertimbangkan kedua-dua kenyataan secara penuh untuk menentukan 'sama ada kemasukan kenyataan memfitnah tersebut adalah berjustifikasi' berdasarkan pendedahan Tengku Razaleigh, yang mana pembuatannya adalah benar.

(5) Permintaan perayu untuk pembukaan semula siasatan memberikan 'sumbangan sebenar kepada unsur kepentingan umum dalam artikel tersebut'. Ia tidak bercanggah daripada tiga ujian yang dikemukakan dalam kes *Reynolds v. Times Newspaper Ltd* kerana: (i) siasatan sebelumnya tidak menghasilkan penerbitan laporan berkaitan dengan sebab nahas tersebut; (ii) versi dalam kedua-dua buku tersebut berbeza daripada pendedahan Tengku Razaleigh dan tidak ada keterangan bahawa Tengku Razaleigh adalah punca versi nahas seperti yang terkandung dalam dua buku tersebut. Pendedahan beliau jelas menunjukkan maklumat baru yang mewajarkan siasatan baru terhadap nahas tersebut, menjustifikasikan panggilan perayu untuk siasatan baru untuk menjelaskan kesemua keraguan berkaitan sebab nahas tersebut; dan (iii) nada artikel tersebut tidak boleh dikatakan sebagai provokasi kerana perayu hanya memanggil pembukaan semula siasatan dan mengakui fakta bahawa siasatan baru berdasarkan pendedahan Tengku Razaleigh mungkin tidak menghasilkan apa-apa. Perkara fakta adalah bahawa panggilan perayu untuk membuka semula siasatan adalah berkait dengan pendedahan Tengku Razaleigh dan sifat ketidakmuktamadan siasatan sebelumnya.

(6) Award RM1 juta sebagai ganti rugi adalah berlebihan atas fakta khusus kes ini. Hakim bicara telah dipengaruhi oleh keputusan sebelumnya bahawa perayu telah gagal mengesahkan kebenaran pendedahan Tengku Razaleigh apabila tidak ada beban sebegitu kerana pembelaan yang disandarkan adalah perlindungan bersyarat/ ulasan saksama wajar dan bukan justifikasi.

Case(s) referred to:

Datuk Harris Mohd Salleh v. Datuk Mohd Shafie Hj Apdal & Ors [2009] 2 CLJ 682 HC ***(refd)***

Harry Isaacs & Ors v. Berita Harian Sdn Bhd & Ors [2012] 1 LNS 1359 CA ***(refd)***

Jameel v. Wall Street Journal [2006] 4 All ER 1279 ***(foll)***

MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun & Other Appeals [1995] 2 CLJ 912 ***(refd)***

Reynolds v. Times Newspapers Ltd [1999] 4 All ER 609 ***(foll)***

Tun Mustapha v. YDP Negeri Sabah & Ors [1986] 2 MLJ 420 ***(refd)***

For the appellant - Simon Shim Kong Yip; M/s Shim Pang & Co
For the respondent - Yunof Maringking; M/s Maringking & Co

[Editor's note: For the High Court judgment, please see Datuk Harris Mohd Salleh v. Datuk Yong Teck Lee & Anor [2012] 9 CLJ 743.]

Reported by S Barathi

JUDGMENT

Anantham Kasinather JCA:

Background Facts

[1] On 6 June 1976, two Nomad aircrafts were scheduled to return to Kota Kinabalu ("KK"), one *via* Kudat and the other directly to KK. The Nomad aircraft scheduled to return to KK directly, never made it back as it crashed near Sembulan. A substantial number of the cabinet members of the then ruling party of the State Government of Sabah namely the Berjaya party including the then Chief Minister of the State Tun Fuad Stephens were killed in the crash.

[2] There was an air of unease concerning the crash because there were rumours that two prominent West Malaysians and the then Chief Minister of Sarawak, who were in the original passenger list for this flight disembarked just before this Nomad

aircraft departed for KK. One of the two prominent West Malaysians was the then Finance Minister of Malaysia Tengku Razaleigh. The rumours concerned the role played by the respondent in the disembarkation of the aforesaid three passengers. The role played by the respondent was of considerable public interest partly because the respondent was about the only senior member of the State Cabinet to be not on the flight and the respondent assumed the role of Chief Minister following the crash.

[3] The cause of the crash naturally formed the subject matter of investigations conducted by the Federal Government of Malaysia and the State Government of Sabah. Although the results of these investigations were never made public, books bearing the title "Harris Salleh of Sabah" and "The Sabahan - The Life and Death of Tun Fuad Stephen" speculated on the causes of the crash. The contents of these books and other contemporaneous literature on this subject in the media only served to fuel speculation on the real causes of the crash, in the absence of an official report. There is no doubt that sabotage was one of the many causes speculated by the public.

[4] It is safe to say that the speculation over the causes for this crash was on the wane by the year 2010 although on 6 June every year, there is an official state memorial conducted by senior state officials and members of the victim's family at the crash site to commemorate the crash. However, this whole issue was reignited by the speech of one of the two West Malaysians who had disembarked from the aircraft on that fateful day. The incident that reignited interest on this subject was the visit to Sabah of Tengku Razaleigh and a speech that he delivered on 2 April 2010. On this date, Tengku Razaleigh addressing an audience at a forum at Penampang, Sabah revealed for the first time in public that he was already seated and strapped to his seat in the aircraft together with the late Tun Fuad and the Tengku Bendahara Pahang when the respondent came on board and invited him to leave the aircraft and board another aircraft to visit the respondent's cattle farm in Banggai. Tengku Razaleigh then, in turn, according to Tengku's speech at this forum, invited Tun Rahman Yaakub and Tengku Bendahara Pahang to join him to visit the cattle farm.

[5] Although the appellant was not a member of the audience, several witnesses who were present at this forum, claimed that there was complete silence following Tengku's revelation of this

information. The revelation was quickly picked up by the local media and subsequently published in the Daily Express on 4 April 2010. The appellant upon receiving this information, according to him, immediately checked to verify the fact of this revelation from persons present at the forum. Thereafter the appellant issued a statement on 4 April 2010 and which statement was published in the Daily Express on 5 April 2010 under the caption "SAPP Wants File On Triple Six Tragedy Probe Reopened". This statement essentially called for a reinvestigation of the crash in the light of this new information. Two other persons namely (DW3) and (DW6) also made similar statements.

[6] On 7 April 2010, the respondent issued a statement disputing Tengku Razaleigh's version of the events that transpired on 6 June 1976. By this statement, the respondent also challenged the appellant to repeat his earlier statement with the threat to institute proceedings against him for defamation if he dared to repeat his statement. The appellant in purported acceptance of this challenge repeated his call for a reinvestigation of the causes behind the crash by issuing a second statement and which statement was published in the Daily Express on 8 April 2010 under the caption "Basis To Reopen Due To New Info: Yong". By this second statement, the appellant set out the reasons behind his call for the reinvestigation of the crash. According to the appellant, his main objective in calling for the reinvestigation of the crash was to remove all doubts about the causes behind the crash. The appellant speculated that such reinvestigation may either produce something big and explosive or nothing at all. The appellant's statement of 8 April 2010 was published in Daily Express on 9 April 2010.

[7] The respondent having threatened to commence legal proceedings if the appellant repeated his statement, then, carried out his threat by commencing legal proceedings against the appellant for libel claiming the sum of RM15 million in damages. The trial of the respondent's claim commenced on 16 November 2011 and was completed on 22 November 2011. The learned trial judge ruled in favour of the respondent on 29 February 2012 and ordered the appellant to pay the sum of RM1 million as damages to the plaintiff. The appellant was also restrained by injunction from printing and publishing further the statements attributed to him in the Daily Express.

Judgment Of The Court

[8] The appellant raised numerous defences in resisting the libel claim including asserting that the press releases did not refer to the respondent and that the contents of his two statements were not defamatory. The learned trial judge dismissed the first defence since the second statement:

> was made in response to the Plaintiff's challenge to the 1st defendant. By issuing the second statement in response to the Plaintiff's challenge the 1st defendant could not have been referring to any person other than the Plaintiff. I find it proved that the statements refer to the Plaintiff.

As regards the second defence, His Lordship in ruling the two statements to be defamatory described the sting in the statements to be beneath the surface. To put it in His Lordship's own words:

> Read between the lines and in the context of the speech by Tengku Razaleigh the 1st defendant's call for re-investigation was in pith and substance a call to investigate the Plaintiff for a possible involvement in a criminal act. There is nothing wrong for the 1st defendant to call for a re-investigation of the double six tragedy but when he insinuated that the Plaintiff had blood on his hand without making any attempt to verify the truth of the alleged new information revealed by Tengku Razaleigh, the 1st defendant had crossed the line separating fair comment and malice aforethought.

[9] Whilst we have no reason to question the correctness of His Lordship's ruling that the statements were defamatory and that the defence of justification did not avail the appellant, we allowed this appeal because we are satisfied that the defence of qualified privilege was not properly considered by the learned trial judge and the law on the subject not properly applied to the facts of this case. His Lordship after correctly spelling out the scope of the defence of qualified privilege in law by citing the following:

> On grounds of public policy the law affords protection on certain occasions to a person acting in good faith and without any improper motive who makes a statement about another person which is in fact untrue and defamatory. Such occasions are called occasions of qualified privilege. As a general rule, there must be a common interest and corresponding duty or interest between the person who makes the communication and the person who receives it." (see the book titled '*In Words and Phrases Legally Defined Vol. 3*')

and quoting Lord Atkinson in *Adam v. Ward* [1917] AC 309

> a privilege is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential. (page 22 of the High Court judgment)

then, in our judgment, with respect, incorrectly, applied the law to the facts.

[10] His Lordship ruled that the appellant had failed to establish the defence of qualified privilege because:

> similarly in the present case the defendants had no duty to communicate the information to the press and neither the press nor the world at large had common interest to receive the information which in the way it was presented by the 1st defendant was in truth and substance an insinuation of criminal conduct on the part of the Plaintiff. (page 24 of the High Court judgment)

[11] In our opinion, the first ingredient of the defence of qualified privilege was whether the occasion which caused the appellant to issue the two statements and the subsequent publication of the same was a privileged occasion. The answer to this question, in turn, depends on whether the appellant had an interest or duty, legal, social or moral to issue the statements to the public at large and whether the public in turn had a corresponding interest in receiving this information. In our judgment, the answer to this question is in the affirmative for the following reasons:

(a) neither the Federal Government nor the State Government had released a formal report of the causes of the crash. For this reason, the cause of the crash was still not a matter that could be considered settled in the minds of the citizens of the State of Sabah. To the extent different theories for the crash were included in the two books cited by His Lordship and the media, it is safe to assume that the public would be interested to know of any other theory particularly since the earlier theories surfaced during the period when the respondent was the Chief Minister of Sabah and for this reason arguably favourable to him;

(b) the respondent was apparently the only senior member of the Berjaya cabinet to be not in the fatal flight. This fact coupled with the fact that the respondent was to return to KK on the same day but in another aircraft must necessarily fuel public interest in any revelation concerning the circumstances leading to three of the passengers leaving this aircraft for the aircraft which included the respondent as a passenger. Against this background, the revelations of Tengku Razaleigh that the respondent was the person who was instrumental in him being required to leave the fatal aircraft is clearly of a nature which would interest the leader of a political party in the state and for him to communicate these revelations to the members of the public through the publication of his statements in the media; and

(c) it is not in dispute that the revelations of Tengku Razaleigh were previously unknown to the public and in all likelihood not available to the inquiry committees which investigated the crash, at least, to the knowledge of the appellant. The fact that the respondent saw the need to promptly dispute Tengku Razaleigh's version by issuing a statement of his own in the news media itself reflects continued public interest in the crash and more particularly the causes behind the crash.

[12] In our judgment, the law on the defence of qualified privilege has been refined to protect disclosures by the maker of a statement so long as the maker is able to satisfy the court that it is in the interest of the public to receive frank and uninhibited communication of particular information. Lord Nicholls of Birkenhead expounded this defence in the following terms in the leading judgment of the House of Lords in the case of *Reynolds v. Times Newspapers Ltd* [1999] 4 All ER 609:

> the requirement that both the maker of the statement and the recipient must have an interest or duty draws attention to the need to have regard to the position of both parties when deciding whether an occasion is privileged. But this should not be allowed to obscure the rationale of the underlying public interest on which privilege is founded. The essence of this defence lies in the law's recognition of the need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source. That is the end the law is concerned to attain. The protection afforded to the maker of the statement is the means by which the law seeks to achieve

A that end. Thus the Court has to assess whether, in the public interest, the publication should be protected in the absence of malice.

In determining whether an occasion is regarded as privileged the Court has regard to all the circumstances: see, for example the
B explicit statement of Lord Buckmaster LC in *London Association for Protection of Trade v. Greenlands Ltd* [1916] 2 AC 15 at 23, [1916-17] All ER Rep 452 at 456 ('every circumstance associated with the origin and publication of the defamatory matter'). And circumstances must be viewed with today's eyes. The
C circumstances in which the public interest requires a communication to be protected in the absence of malice depend upon current social conditions. The requirements at the close of the twentieth century may not be the same as those of earlier centuries or earlier decades of this century.

D Privilege and publication to the world at large

Frequently a privileged occasion encompasses publication to one person only or to a limited group of people. Publication more widely, to persons who lack the requisite interest in receiving the information, is not privileged. But the common law has recognised
E there are occasions when the public interest requires that publication to the world at large should be privileged. In *Cox v. Feeney* [1863] 4F & F 13 at 19, 176 ER 445 at 448 Cockburn CJ approved an earlier statement by Lord Tenterden CJ that 'a man has a right to publish, for the purpose of giving the public
F information, that which it is proper for the public to know. Whether the public interest so requires depends upon an evaluation of the particular information in the circumstances of its publication. Through the cases runs the strain that, when determining whether the public at large had a right to know the particular information, the Court has regard to all the
G circumstances. The Court is concerned to assess whether the information was of sufficient value to the public that, in the public interest, it should be protected by privilege in the absence of malice (at page 616 and 617 of the judgment)

H **[13]** In our judgment, in the face the facts set out in para. 11 above and applying the law expounded by Lord Nicholls, the appellant's statements were issued on a privileged occasion since the respondent had a duty or, at the least, an interest as a politician and the leader of a political party to communicate to the
I public at large through his first and second statements, the contents of the Tengku Razaleigh's revelations and to call for the fresh inquiry into the causes of the crash. In our judgment, a

careful examination of the reason advanced by His Lordship in refuting proof of the first ingredient of this defence was merely to conclude that:

> similarly in the present case the defendants had no duty to communicate the information to the press and neither the press nor the world at large had common interest to receive the information in the way it was presented by the 1st defendant was in truth and substance an insinuation of criminal conduct on the part of the Plaintiff.

With respect, the law is settled that the fact that the statement is defamatory does not prevent the occasion from being a privileged occasion. Whether the appellant abused the occasion by being actuated by malice so as to deprive the occasion from being a privileged one, is an entirely different issue.

Malice

[14] We now propose to examine the facts to ascertain whether the appellant was actuated by malice. The appellant's explanation for issuing the two statements was that:

> I am involved in politics. The said plane crash took the lives of some very prominent political leaders in Sabah which is a very significant event in Sabah. The public would and should be given the chance to know on whether it is true that the Plaintiff was the one who at the very last minute requested the said Tengku Razaleigh to board another plane and what was the real cause of the air crash.
>
> (page 25 of the Judgment of the High Court)

[15] The learned trial judge dismissed this explanation on two grounds. The first ground was that:

> (a) Thus the basis of the 1st defendant's call for a re-investigation was that the public should be given the chance to know if it was true that it was the Plaintiff who at the very last minute requested Tengku Razaleigh to board the other plane. However, the 1st defendant admitted during cross examination that he did not verify with Tengku Razaleigh on the accuracy of his revelation. He should have, because Tengku Razaleigh was available and it was easy for him to do so. It is obvious that the 1st defendant did not care whether the revelation by Tengku Razaleigh was true or not. He is therefore to be treated as if he knew the

A revelation to be false. This indifference and couldn't care less attitude is evidence of malice on the part of the 1st defendant and by extension the 2nd defendant.

(pages 25 & 26 of the Judgment of the High Court)

B The second ground was that:

(b) Was it a *bona fide* call for a fresh investigation or was it a call to investigate the Plaintiff for a possible criminal act? There is a subtle difference between the two motives. It is pertinent to note that Tengku Razaleigh in his speech did not C call for a re-investigation of the air crash, let alone to suggest that the Plaintiff was accessory to a criminal act. What the 1st defendant did was to give his own slant to Tengku Razaleigh's revelation in order to cast aspersion on the Plaintiff. It is clear that the 1st defendant had seized on D the occasion to provoke public speculation that the Plaintiff was up to no good when he asked Tengku Razaleigh to board another plane at the last moment. This is unfair to the Plaintiff because the 1st defendant himself knew that there are conflicting historical accounts of the events prior to the crash.

E

(pages 26 & 27 of the Judgment of the High Court)

[16] In other words, the learned trial judge's finding of malice was on the premise that to succeed in this defence the appellant had F to prove that Tengku Razaleigh's version was true. The appellant's failure to verify the truth of the revelations with Tengku Razaleigh directly was considered by His Lordship as affording evidence of malice. With respect, this does not represent the law. A careful examination of the law on qualified privilege set out in para. 9 of this judgment reveals that the fact that the statement "is in fact G untrue and defamatory" does not preclude this defence from availing the appellant. Indeed, it is trite law that qualified privilege as a live issue only arises where the statement is defamatory and untrue (see para. 32 of the judgment of Lord Bingham of Cornhill in H *Jameel v. Wall Street Journal* [2006] 4 All ER 1279 at 1290). Accordingly, in our judgment, the learned trial judge fell into serious error in dissecting the speech of Tengku Razaleigh to ascertain the truth of the contents of the same before concluding that to the extent the appellant had not verified the truth of the I contents of Tengku Razaleigh's speech, "he is therefore to be treated as if he knew the revelation to be false" (see para. 773 at p. 26 of His Lordship's judgment).

[17] We acknowledge that the defence of qualified privilege requires a factual basis. However, the factual basis on the facts of this case is not whether the revelations of Tengku Razaleigh are true but whether it is true that he made the revelations. There is ample evidence of this fact as there is the unchallenged evidence of the appellant that he verified whether Tengku Razaleigh made the revelations with several persons who were present at the forum. Secondly, there is also the evidence of DW4 of his attendance at this forum and of Tengku Razaleigh's revelations during the course of his speech at this forum. Indeed, the learned trial judge appears to have acknowledged this fact to be true as evidenced by the following passage in His Lordship's judgment:

> it is pertinent to note that Tengku Razaleigh in his speech did not call for a re-investigation of the air crash let alone to suggest that the Plaintiff was accessory to a criminal act. What the 1st defendant did was to give his own slant to Tengku Razaleigh's revelation in order to cast aspersion on the Plaintiff. (paragraph 791 to 794 of His Lordship's judgment).

[18] The learned trial judge also fell into serious error in ruling that the appellant acted with malice because he called for a reopening of investigations when this did not form part of Tengku Razaleigh's speech. In other words, in His Lordship's view, since the appellant's call for the re-opening of the original investigations was defamatory and this call did not form part of Tengku Razaleigh's revelations, the appellant cannot rely on the defence of qualified privilege. With respect, this, in our view, is not the proper application of the law of qualified privilege. The law requires the judge to consider the appellant's two statements as a whole and if the article as a whole is justifiable, then, the defence of qualified privilege avails the appellant even if the article is defamatory and some facts untrue. Lord Bingham in *Jameel v. Wall Street Journal (supra)* considered whether the inclusion of a particular ingredient of a composite story can result in the loss of the defence of qualified privilege on the grounds "that the article could have been published without the inclusion of the particular ingredient complained of". His Lordship's view was that:

> some misunderstanding may perhaps have been engendered by Lord Nicholls' references [1999] 4 All ER 609 at 616,619 [2001] 2 AC 127 at 195, 197) to 'the particular information'. It is of course true that the defence of qualified privilege must be considered with reference to the particular publication complained of as defamatory, and where a whole article or story is

A complained of no difficulty arises. But difficulty can arise where the complaint relates to one particular ingredient of a composite story, since it is then open to a Plaintiff to contend, as in the present case, that the article could have been published without inclusion of the particular ingredient complained of. This may, in some instances, be a valid point. But consideration should be given to the thrust of the article which the publisher has published. If the thrust of the article is true, and the public interest condition is satisfied, the inclusion of an inaccurate fact may not have the same appearance of irresponsibility as it might if the whole thrust of the article is untrue".

(paragraph 34 at page 1291 of the Judgment)

[19] In other words, even if the appellant's call for the re-opening of the investigations was defamatory, and this call did not form part of Tengku Razaleigh's revelations, in our judgment, to rule against the appellant on the ingredient of malice, His Lordship ought to have considered the two statements as a whole to determine "whether the inclusion of the defamatory statement was justifiable" in the light of the Tengku Razaleigh's revelations, the making of which is true. Lord Hoffmann in His Lordship's judgment in the same case of *Jameel v. Wall Street Journal (supra)* explained this principle to be:

if the article as a whole concerned a matter of public interest, the next question is whether the inclusion of the defamatory statement was justifiable. The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article. But whereas the question of whether the story as a whole was a matter of public interest must be decided by the judge without regard to what the editor's view may have been, the question of whether the defamatory statement should have been included is often a matter of how the story should have been presented. And on that question, allowance must be made for editorial judgment. If the article as a whole is in the public interest, opinions may reasonable differ over which details are need to convey the general message. The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are, *ex hypothesi*, in the public interest, too risky and would discourage investigative reporting".

(paragraph 51 at page 1296 of the Judgment)

[20] In our judgment, the appellant's call for a re-opening of the investigations was clearly justifiable in the light of the following facts:

(a) there was no official report following the investigations conducted by the Federal and State Governments;

(b) there were contrasting versions of the circumstances under which Tengku Razaleigh had disembarked from the aircraft and alighted the next aircraft;

(c) the respondent had in the past given his version of these circumstances but the respondent's version differed materially from that of Tengku Razaleigh; and

(d) there is no evidence that the source for the versions consistent with the respondents and to be found in the two books was Tengku Razaleigh.

[21] Applying Justice Hoffman's pronouncements to the facts of this case, in our judgment, the appellant's call made "a real contribution to the public interest element in the article". The learned trial judge in answering this question in the negative was, in our judgment, unduly influenced by His Lordship's earlier finding that Tengku Razaleigh's revelations were untrue because they were in conflict with the version to be found in the two books. In our judgment, the answer to this question ought to have been determined by the application of three of the ten points test propounded by Justice Nicholls in the *Reynolds v. Times Newspapers Ltd (supra)*. The first test related to the seriousness of the allegation. The principle being the more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. Secondly, the fifth test which related to the status of the information. The principle being that the call for the re-opening of the investigations is unjustified if the previous investigations had reached a conclusion which commands respect. The third test being the tone of the article. The issue being whether the article merely raised queries or a call for investigations as opposed to asserting false allegations in the form of a statement of fact.

[22] In our judgment, the appellant's call for the re-opening of the investigations does not run foul of any of the aforesaid three tests. First, because the earlier investigations did not result in the publication of a report as regards the causes for the crash.

Secondly, the versions in the two books vary from Tengku Razaleigh's revelations and there is no evidence that Tengku Razaleigh is the source for the versions of the crash contained in the two books. For this reason, his revelations clearly amounted to new information which warranted a fresh look at the crash. Hence, the justification for the appellant's call for fresh investigations to clear all doubts for the cause of the crash. Finally, the tone of the article cannot be said to be provocative since the appellant merely called for a re-opening of the investigations and acknowledged the fact that the fresh investigations based on Tengku Razaleigh's revelations may result in nothing at all. The fact of the matter is that the appellant's call for the re-opening of the investigations ties in with Tengku Razaleigh's revelations and the inconclusive nature of the earlier investigations.

Finding On Liability

[23] In our judgment, the learned trial judge's misunderstanding of the law relating to the defence of qualified privilege caused His Lordship to erroneously rule the appellant to have been actuated by malice in making the call for fresh investigations concerning the crash. In our view, this error on the part of His Lordship is sufficiently serious to warrant appellate intervention. Accordingly, we allowed this appeal and set aside His Lordship's judgment in favour of the respondent on the conclusion of the hearing of the appeal. In the light of our decision that the appellant succeeds in the defence of qualified privilege, we do not propose to consider in this judgment the remaining defences raised by the appellant.

Damages

[24] In our judgment, even if we are wrong on the issue of liability, His Lordship's award of RM1 million by way of damages is excessive on the particular facts of this case. In our view, His Lordship in awarding the sum of RM1 million was influenced by His Lordship's earlier ruling that the appellant had failed to verify the truth of Tengku Razaleigh's revelations when there is no such burden since the defence relied upon was qualified privilege/fair comment and not justification. That this was an important consideration on the mind of His Lordship when determining the quantum of damages is evident by His Lordship's pronouncements in paras. 1190 to 1195 of the judgment:

> the seriousness of the libel and the recklessness in the way it is published are relevant factors in determining the quantum of damages. In the present case the insinuation of criminal conduct was a very serious libel perpetrated on the Plaintiff. Nothing can be more humiliating than to be accused of plotting to murder a serving Chief Minster in order to usurp his position, compounded as it was by the reckless manner in which the defamatory statements were published.

[25] Secondly, His Lordship in arriving at the quantum of RM1 million also placed great emphasis on the award RM3 million made by Gopal Sri Ram JCA in the case of *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun & Other Appeals* [1995] 2 CLJ 912; [1995] 2 MLJ 493. We have had occasion in the case of *Harry Isaacs & Ors v. Berita Harian Sdn Bhd & Ors* [2012] 1 LNS 1359 to caution judges of the High Court against placing too much emphasis on this award since it was an award made during a period of unrestrained excesses on the part of the judiciary.

[26] Thirdly, it was wrong of the learned trial judge to totally disregard the award of only RM50,000 to the respondent by way of damages by the High Court in the case of *Datuk Harris Mohd Salleh v. Datuk Mohd Shafie Hj Apdal & Ors* [2009] 2 CLJ 682. We opine to this effect because the respondent was similarly the plaintiff in that case and the respondent's claim was for defamation, as in the case here. Finally, with respect, since the award of damages for defamation is very much dependent on the character of the claimant, the pronouncements of the High Court Judge in the case of Tan Chiaw Thong J in *Tun Mustapha v. YDP Negeri Sabah & Ors* [1986] 2 MLJ 420 concerning the character of the respondent is clearly a relevant factor in determining the damages to be awarded to the respondent. For this reason, in our opinion, the learned trial judge erred in commenting as follows:

> I can only think of one reason why the defendants drew the Court's attention to all these cases, and that is to provide additional oomph to their allegation that the Plaintiff is a person of questionable character. The reference to the Judge's remarks in the Tun Mustapha case is wholly unnecessary and unfair to the Plaintiff as he was not even a witness in that case and therefore not in a position to defend himself against those remarks, whatever the context they were made.
>
> (paragraph 1300 at page 43 of the High Court judgment)

when rejecting the submission that His Lordship should have regard to the observation of the judge in the case of Tan Chiaw Thong J in *Tun Mustapha v. YDP Negeri Sabah & Ors (supra)* concerning the character of the respondent. Accordingly, in all the circumstances of this case, in our judgment, even if the learned trial judge was right on the issue of liability, the damages awarded to the respondent ought to have been RM100,000 and not RM1 million.

[27] Accordingly, we allowed this appeal and set aside the orders of the High Court. We ordered the respondent to pay costs of RM150,000 as costs here and below and further ordered the respondent to return to the appellant within two weeks of our judgment, all damages paid by the appellant to the respondent pursuant to the order of the High Court. The deposit to be refunded to the appellant.